

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ELIZABETH A. TOZZI**

Claimant

VS.

**C & C SALES, INC.**

Respondent

AND

**BUILDERS ASSOC. SELF-INSURERS  
FUND**

Insurance Carrier

Docket No. 1,029,094

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the May 9, 2007, Award entered by Special Administrative Law Judge John Nodgaard. The Board placed this appeal on its summary docket for disposition without oral argument.<sup>1</sup> Michael R. Wallace, of Shawnee Mission, Kansas, appeared for claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Special Administrative Law Judge (SALJ) found that based upon the testimony of Dr. John B. Moore, IV, and Dr. Edward Prostic, claimant sustained a 10 percent impairment to her left upper extremity and a 10 percent impairment to her right upper extremity, which combined for a 12 percent impairment to the body as a whole. In accordance with *Casco*,<sup>2</sup> the SALJ calculated claimant's compensation as two scheduled injuries to the arm at the 210 week level pursuant to K.S.A. 44-510(d). Further, the SALJ found that claimant was capable of engaging in substantial and gainful employment.

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<sup>1</sup> For the purposes of K.S.A. 2006 Supp. 44-551(i)(1), July 27, 2007, is the date arguments were presented to the Board.

<sup>2</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

The Board has considered the record and adopted the stipulations listed in the Award. Although the transcript of the deposition of Dr. Moore, taken January 30, 2007, was not listed in the SALJ's recitation of the record, we notice he made reference to it in his statement of facts. Reference was also made to the deposition of Dr. Moore in respondent's submission letter.<sup>3</sup> Accordingly, the Board has considered the transcript of the deposition of Dr. Moore and the exhibits in its review of this appeal.

### ISSUES

Claimant requests the Board review the SALJ's findings concerning the nature and extent of claimant's disability. Claimant contends that bilateral carpal tunnel claims should be compensated pursuant to K.S.A. 44-510e rather than as two scheduled injuries under K.S.A. 44-510d. Further, she contends she is entitled to a work disability. In the event the Board finds claimant should be compensated based upon two scheduled injuries, claimant argues she should be compensated at the rate of 20 percent to the left upper extremity and 10 percent to the right upper extremity, based upon the ratings of Dr. Prostic. Finally, claimant contends the SALJ erred in calculating her award by deducting 5.29 weeks of temporary total disability benefits from each of her scheduled injuries. Claimant states she did not miss any work for treatment of her right upper extremity, and temporary total disability benefits should only be deducted on the award of compensation for her left upper extremity.

Respondent argues the SALJ properly compensated claimant on the basis of two scheduled injuries as opposed to a general body impairment rating or work disability. Respondent does not dispute claimant's allegation that all of the weeks of temporary total disability compensation are attributable to her left upper extremity.

The issues for the Board's review are:

(1) Should claimant's bilateral carpal tunnel syndrome injuries be compensated under K.S.A. 44-510e as a general body impairment or under K.S.A. 44-510d as two scheduled injuries?

(2) If claimant's injuries are compensated as two scheduled injuries, did the SALJ err in finding she had only a 10 percent permanent partial impairment to the left upper extremity?

(3) Did the SALJ err in deducting 5.29 weeks of temporary total disability benefits from each of claimant's scheduled injuries?

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<sup>3</sup> Resp. submission letter filed Feb. 26, 2007, at 2.

**FINDINGS OF FACT**

Claimant worked for respondent as a project assistant. Her job duties included putting together performance manuals, operation and maintenance manuals, and submittals. She was required to collate pages and bind the manuals with spiral binders. She began noticing numbness and a constant pain in both her hands in March 2006. The pain went from her thumb up her arm, and her symptoms worsened because of her job. Claimant also has a bipolar condition.<sup>4</sup>

Claimant informed respondent about her hand conditions and was provided medical treatment, first with Concentra and then with Dr. John Moore. Dr. Moore performed surgery on her left hand on April 20, 2006. Mike Scherrer, respondent's vice president, testified that respondent accommodated Dr. Moore's temporary restrictions. She returned to full duty work sometime around the end of June 2006.

Claimant is no longer employed by respondent. The record does not establish that she was terminated due to her injuries. Mr. Scherrer testified that claimant was terminated because she had a poor attitude toward the company, because she discovered confidential information and shared that information with other employees, and because she was interviewing for positions outside of the company.

At the regular hearing, claimant stated that her left hand throbs and burns and is numb. She has lost some of her grip strength. Her right hand is starting to show the same symptoms that the left had earlier, including losing grip strength. She is also having trouble with her thumbs.

After claimant was terminated by respondent, she briefly held a job at Kansas City Power & Light Company (KCPL), where she worked as a project assistant. The job was not labor intensive, and her hands were not worse after that period of employment. She was terminated from the position at KCPL on November 22, 2006, because the scope of the position was changing and would encompass more report writing. She currently is without a job but is looking for work.

Dr. Moore, who is board certified in plastic surgery and hand surgery, first saw claimant on March 17, 2006. Claimant complained to him of increasing numbness and tingling in both hands, left worse than right. She had constant numbness in her left thumb and said her hands wake her up often. She told him she had decreased grip strength and increased swelling in the base of her left thumb. He operated on claimant's left wrist on April 20, 2006. He last saw her on June 23, 2006.

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<sup>4</sup> Claimant has made no claim for either medical treatment or permanent partial disability compensation for any aggravation of her preexisting psychological condition.

Using the *AMA Guides*,<sup>5</sup> Dr. Moore rated claimant as having a 10 percent permanent partial impairment of her left upper extremity at the hand level, which converts to a 6 percent permanent partial impairment to the body as a whole. Although Dr. Moore agreed that an EMG performed on claimant before the surgery revealed she had mild carpal tunnel syndrome in both wrists and that claimant's right wrist has never been surgically corrected, he found that claimant had no impairment on the right. He used measurements of grip strength, range of motion, and sensation and pinch strength and found that claimant had 0 percent impairment to her right upper extremity. On cross-examination, Dr. Moore acknowledged that the *AMA Guides* would allow for a 10 percent impairment rating for claimant's right carpal tunnel syndrome using the diagnosis related estimate (DRE) method. Nevertheless, Dr. Moore did not change his opinion that claimant had no permanent impairment of function on the right.

Dr. Moore did not assign any permanent work related restrictions to claimant as a result of her bilateral arm complaints. He reviewed the task list prepared by Michael Dreiling and said that he would not preclude her from performing any of the tasks on that list.

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on August 16, 2006, at the request of her attorney. She gave a history of her employment, medical treatment, and surgery on her left hand. She denied any previous difficulties with her arms. She told Dr. Prostic she continued to have more pain in her left hand than her right, minimal paresthesias of the right hand, and loss of grip strength. She said she had begun to awake at night with symptoms in the left hand.

Upon examining claimant's right hand, Dr. Prostic found she had tenderness of the palmar pillar and weakness of pinch. There was no heat, swelling, erythema or atrophy noted, and range of motion was within normal limits. There was a negative testing for pronator syndrome and carpal tunnel syndrome. On the left, Dr. Prostic found claimant had a positive Tinel test, poor pinch strength, and severe tenderness about the palmar pillar. Range of motion and stability of all joints were within normal limits. Claimant had a positive flexion compression median nerve test on her left, which indicates a diagnosis of carpal tunnel syndrome. That was not present on the right.

Dr. Prostic opined that claimant sustained repetitious minor trauma to her upper extremities. She had surgery on her left with inadequate relief and was getting worse bilaterally. He recommended she have a repeat EMG. If the EMG revealed evidence of carpal tunnel entrapment, she would need open median nerve decompression with consideration of tenosynovectomy. If the EMG was negative, claimant should undergo intensive desensitization exercises for her left hand.

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<sup>5</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Using the *AMA Guides*, Dr. Prostin rated claimant as having a 10 percent permanent partial impairment of the right upper extremity and a 20 percent permanent partial impairment of the left upper extremity, for a combined impairment of 17 percent to the body as a whole. He recommended claimant not work at duties that require repetitious forceful gripping of either hand. She should not do prolonged handwriting or keypunching.

Dr. Prostin reviewed a task list prepared by Michael Dreiling. Of the 9 tasks on that list, Dr. Prostin opined claimant was unable to perform 9, for a task loss of 100 percent.

Michael Dreiling, a vocational consultant, met with claimant on September 27, 2006, at the request of her attorney. Together they prepared a list of her job tasks in the 15-year period before her work injury. That list contains 9 unduplicated tasks. Mr. Dreiling reported that claimant was unemployed at the time he met with her and had a 100 percent wage loss. He anticipated that she would be able to work in an office setting that was slower paced and less demanding. She would, however, not be able to use a keyboard on a prolonged basis or do much handwriting. Mr. Dreiling opined that claimant could anticipate earning a wage in the \$10 to \$11 per hour range.

#### **PRINCIPLES OF LAW**

K.S.A. 44-510c states in part:

(a) Where death does not result from the injury, compensation shall be paid as provided in K.S.A. 44-510h and 44-510i and amendments thereto and as follows:

....

(2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

K.S.A. 44-510d(a) states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments

thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

.....

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

K.A.R. 51-7-8 states in part:

(a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.

.....

(c)(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be  $66\frac{2}{3}\%$  of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of

permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In *Casco*,<sup>6</sup> the Kansas Supreme Court stated:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.

K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.

### **ANALYSIS**

The Board agrees with the SALJ's findings and conclusions, including that claimant's percentage of permanent impairment is 10 percent to both upper extremities. And the Board specifically agrees with and affirms the SALJ's conclusion that *Casco* requires that claimant's bilateral upper extremity injuries be compensated as two separate scheduled injuries rather than a general body disability. However, the Board disagrees with the SALJ's award calculations. Because claimant was taken off work by Dr. Moore only for the left carpal tunnel syndrome surgery, the SALJ erred by deducting 5.29 weeks

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<sup>6</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 8, 9, 10, 154 P.3d 494 (2007).

of temporary total disability from both the left and right scheduled injury awards. The SALJ also erred by compensating claimant's carpal tunnel syndrome injuries as injuries to the arms (210 weeks). As these injuries were to the wrists, the permanent partial disability compensation should be to the forearms (200 weeks). Claimant is not alleging that she is permanently and totally disabled.

### **CONCLUSION**

(1) Claimant's bilateral carpal tunnel syndrome injuries are to be compensated as two separate scheduled injuries to her forearms.

(2) Claimant's permanent impairment under the AMA *Guides* is 10 percent to her right upper extremity and 10 percent to her left upper extremity. As her injuries were to the wrists, she should be compensated at the level of the forearm.

(3) Claimant's period of temporary total disability is all attributable to her left carpal tunnel syndrome.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Special John Nodgaard dated May 9, 2007, is modified to reflect that all of claimant's temporary total compensation is attributable to her left upper extremity and that her scheduled upper extremity injuries are both to the level of the forearm but is otherwise affirmed.

#### **Left Forearm**

Claimant is entitled to 5.29 weeks of temporary total disability compensation at the rate of \$405.76 per week in the amount of \$2,146.47 followed by 19.47 weeks of permanent partial disability compensation, at the rate of \$405.76 per week, in the amount of \$7,900.15 for a 10 percent loss of use of the left forearm, making a total award of \$10,046.62, which is due and owing and ordered paid in one lump sum minus any amounts previously paid.

#### **Right Forearm**

Claimant is entitled to 20 weeks of permanent partial disability compensation, at the rate of \$405.76 per week, in the amount of \$8,115.20 for a 10 percent loss of use of the right forearm, making a total award of \$8,115.20, which is due and owing and ordered paid in one lump sum minus any amounts previously paid.

**IT IS SO ORDERED.**



Dated this \_\_\_\_\_ day of September, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
John Nodgaard, Special Administrative Law Judge  
Robert H. Foerschler, Administrative Law Judge